Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1643

MARTIN WILLARD HOULTIN,
Petitioner.

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MARTIN WILLARD HOULTIN, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 30, 1978.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 566 F.2d 1027 and is printed in Appendix A hereto, infra, page 1a. The prior opinion of the United States Court of Appeals for the Fifth Circuit involving Petitioner is reported at 525 F.2d 943 and is printed in Appendix B, hereto, infra, page 28a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 16a) was entered on January 30, 1978. A timely petition for rehearing and rehearing en banc was denied on April 10, 1978. (Appendix A, infra, page 27a). On April 25, 1978, Appellant's motion to stay the issuance of the mandate pending petition for writ of certiorari to this Court was granted to and including May 10, 1978. (Appendix C, infra, page 46a). Appellant has filed in the United States Court of Appeals for the Fifth Circuit an additional motion to stay issuance of the mandate until May 17, 1978. The jurisdiction of the Supreme Court is invoked under 28 United States Code § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Government should be allowed to retry a defendant whose conviction was reversed because of insufficient evidence, i.e., because all of the evidence against him was the result of an illegal wiretap.



2. Whether the Government should be allowed to use the testimonial evidence of the co-defendants of Petitioner herein who were convicted as a result of an illegal wiretap to which they lacked standing to object to and who testified under a grant of use immunity at Petitioner's retrial.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment provides in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.

## STATEMENT OF CASE

On October 17, 1974, a jury convicted Petitioner Houltin and five co-defendants of conspiring to import and possess marijuana. On appeal to the United States Court of Appeals for the Fifth Circuit, the convictions

of Petitioner Houltin and co-defendant Phillips were reversed because all of the evidence used against them was the result of an illegal wiretap. However, the convictions of the four other co-defendants were affirmed because they lacked standing to challenge the illegal wiretaps. See *United States v. Houltin*, 525 F.2d 943 (5th Cir. 1976). (Appendix B).

The Government then obtained an order from the district court granting use immunity to the convicted co-defendants since the Government lacked any other evidence to retry Petitioner. As a matter of convenience and by stipulation into the record, it was agreed that the testimony of the convicted co-defendants would be the same as that of the Drug Enforcement Administration agents who had testified at the first trial, but who could not now testify because their knowledge resulted from the illegal wiretaps. Petitioner objected to the second trial on the ground that he had been placed in jeopardy once for the same offense charged, and that the testimony of the four co-defendants was the "fruit of the poisonous tree" and inadmissible under the Fourth Amendment to the United States Constitution. The district court overruled both of Petitioner's contentions and found him guilty. Petitioner's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit, with one Judge dissenting. See *United States v. Houltin*, 566 F.2d 1027 (5th Cir. 1978). (Appendix A).



## REASONS FOR GRANTING WRIT

### I.

### Certiorari Should Be Granted To Clarify The Double Jeopardy Implications Of Appellate Court Reversals For Insufficient Evidence.

The first issue in this case was recently argued before this Court on November 28, 1977, but has yet to be decided. *See* 22 CrL 4116 (1977). In the companion cases of *Greene v. Massey*, 546 F.2d 51 (5th Cir. 1977), *cert. granted*, ___ U.S. ___, 97 S.Ct. ___, 53 L.Ed.2d 1077 (1977) and *Burks v. United States*, ___ F.2d ___ (6th Cir. 1977), *cert. granted*, ___ U.S. ___, 97 S.Ct. ___, 53 L.Ed.2d 1059 (1977), the precise double jeopardy issue as presented in Petitioner's case has been submitted to this Court.

Prior to Petitioner's first trial, the district judge found that the wiretaps were illegal and granted his motion to suppress the evidence obtained from the wiretaps. In his pre-trial order, the trial judge stated that in his opinion the wiretaps did not contribute to the apprehension of the defendants or to the seizure of the marijuana that they were transporting, but he left this question to be decided by the jury. The jury, after being instructed to find beyond a reasonable doubt that the arrests would have occurred even without the wiretaps, found each defendant guilty of two conspiracy counts. It is important to note that prior to submission of the case to the jury, Petitioner moved for judgment of acquittal which was denied by the trial court. Further, after the jury had returned its verdict, Petitioner did not move for a new trial. On appeal, the Fifth Circuit reversed the conviction of Petitioner and in doing so explicitly held that the arrests and the

imported marijuana were obtained through exploitation of the illegal wiretaps. *United States v. Houltin*, 525 F.2d 943 (5th Cir. 1976). The only evidence at Petitioner's second trial was the immunized testimony of the four co-conspirators who lacked standing to complain of the illegal wiretap resulting in their conviction. Judge Wisdom, in his strongly worded dissent to the Fifth Circuit's affirmance of Petitioner's conviction after his second trial, stated very clearly how the Government was able to produce additional testimony to convict Petitioner:

> "The prosecution exploited the wiretaps in its grant of immunity to compel the testimony. Only because of the wiretap evidence did the prosecutor have available four witnesses who could be 'immunized' without cost. They were already convicted, so an inability to use their testimony against them was meaningless. The Government might have convicted Houltin by immunizing Phillips or vise-versa. Either of those grants of immunity, however, would have required paying the usual costs of the immunity procedure. The information from the wiretaps made those convictions possible. Moreover, the information from the wiretaps determined who had standing in Houltin I. This in turn identified the witnesses to be given immunity." *United States v. Houltin*, 566 F.2d at 1036.

This Court should clarify the double jeopardy implications of appellate court reversals for insufficient evidence when the insufficient evidence was the result



of a procedural defect in the trial court, namely the admission of evidence resulting from official misconduct.

## II.

## Certiorari Should Be Granted To Prevent The Government From Diluting The Policy Behind The Exclusionary Rule Of Deterring Official Misconduct And Unlawfulness.

This Court recently reaffirmed the holding of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), that verbal evidence unlawfully obtained was subject to exclusion the same as physical or tangible evidence unlawfully obtained. *United States v. Ceccolini*, ___ U.S. ___, 98 S.Ct. ___, 55 L.Ed.2d 268 (1978). In *Ceccolini*, the district court had suppressed the testimony of a material witness concluding that said testimony was the "fruit of the poisoned tree". This Court, in reversing, held that the degree of attenuation was sufficient to dissipate the connection between the illegality and the testimony. In reversing, this Court discussed several criteria that should be considered in determining the admissibility or inadmissibility of evidence resulting from unlawful police conduct. Specifically, this Court placed significant emphasis on the degree of free will exercised by the witness testifying. Another significant factor considered by this Court was the deterrent effect that suppression of the testimony would have on other law enforcement officers. In the present case, the Government granted a meaningless immunity to four co-defendants who were already convicted and was only a means to acquire the additional evidence needed to

retry Petitioner herein. Both the United States Attorney and the trial Judge acknowledged that none of the witnesses wanted to testify. *United States v. Houltin*, 566 F.2d at 1037. Again, Judge Wisdom, in his dissent, clearly stated the results that are likely to occur if Petitioner's conviction is upheld by this Court:

> "My conclusion that the testimony in the case is tainted is buttressed by an examination of the case from this perspective. Allowing this evidence to be introduced will not deter official misconduct; it will encourage illegal wiretaps. After this decision, a government agent investigating a conspiracy case who could not obtain permission to use a wiretap (or who did not seek permission) could place an unlawful tap on one conspirator's telephone, wait until he overheard an incriminating call to which at least one conspirator lacked standing to attack, and use the call to convict that defendant. After the conviction, that defendant would be granted immunity. He would then be forced to testify against the other conspirators. The wiretap in this case was unlawful only because the investigator failed to comply with a technical requirement of 18 U.S.C. 2516(2). Nothing in the majority opinion, however, restricts the loophole to good faith misconduct." *United States v. Houltin*, 566 F.2d at 1038.



## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, to Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and one copy has been mailed, postage prepaid, to Hon. LeRoy Morgan Jahn, Assistant United States Attorney, 655 E. Durango Blvd., San Antonio, Texas 78206 this ____ day of May, 1978.

## APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

Martin Willard HOULTIN and
Kenneth B. Phillips,
Defendants-Appellants.

No. 76-4107.

United States Court of Appeals,
Fifth Circuit.

Jan. 30, 1978.

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Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

This direct criminal appeal presents two issues. First, does the taint from illegal wiretaps extend to the evidence provided by the testimony of codefendants who, without standing to object to the wiretaps, were convicted as a result thereof and then testified under a grant of use immunity against defendants who did

have standing? Second, does the Double Jeopardy Clause of the fifth amendment bar the retrial of defendants whose convictions were reversed because the evidence used to convict them resulted from illegal wiretaps?

On October 17, 1974, a jury convicted defendants Martin W. Houltin and Kenneth B. Phillips and codefendants Robert Burke, Duane Morrison, Michael Francis, and Kenneth J. Croucher on two counts of conspiring to import and possess 2,260 pounds of marijuana in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and 21 U.S.C. § 841(a)(1). The trial judge sentenced each to consecutive five-year terms of imprisonment on each count and imposed varying fines. Defendants and codefendants appealed to this Court, which reversed the convictions of defendants Houltin and Phillips because the police, both federal and state, violated the fourth amendment by using illegal wiretaps during the investigation phase of the case.[1] We sustained the convictions of the four codefendants, however, because they lacked standing under the fourth amendment to challenge the illegal wiretaps. *See United States v. Houltin*, 5 Cir., 1976, 525 F.2d 943, *vacated in part sub nom., Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745, *modified*, 5 Cir., 1977, 553 F.2d 991.[2]

1 The wiretaps were illegal because authorities failed to comply with 18 U.S.C. § 2516(2), which requires the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof" to apply to a state court judge for an order authorizing a wiretap. In this case only an assistant district attorney signed the wiretap applications.

2 A more complete statement of the facts and circumstances surrounding the defendants' and codefendants' arrests and convictions are found in this opinion at 525 F.2d at 945-48.



On remand, Houltin and Phillips waived a jury trial. The Government obtained an order from the district court granting use immunity to convicted codefendants Burke, Morrison, Francis, and Croucher. These codefendants did not actually take the witness stand, however, although they were present in the courtroom. Instead, by stipulation in the record and as a matter of convenience, it was agreed that if they formally testified, their testimony would be the same as that of the D.E.A. agents who had testified at the first trial, but who could not now testify because their knowledge resulted from the illegal wiretaps. Counsel for the Government and defendants also by agreement offered some additional testimony. The district court found Houltin and Phillips guilty and sentenced each to a ten-year term of imprisonment, a special parole term of five years, and a fine. This appeal followed.

### *I. Fruit of the Poisonous Tree*

Houltin and Phillips argue that the trial court erred in allowing the Government to use the testimony of the four codefendants who testified under a grant of use immunity. The evidence provided by such testimony, according to defendants, is "fruit of the poisonous tree," *see Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), because the Government first learned of the substance of codefendants' testimony as well as obtained their arrests and convictions from evidence discovered through the same illegal wiretaps that could not lawfully be used against Houltin and Phillips in the first trial. Defendants contend, in effect, that by forcing the codefendants to testify through a grant of use immuni-

ty the Government is able to circumvent the exclusionary rule and use indirectly against defendants evidence that could not be used against them directly. The Government, on the other hand, argues that the illegal wiretaps did not taint the evidence provided by the codefendants under the order compelling them to testify.

The fourth amendment exclusionary rule was born as a matter of federal law in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and extended to state criminal trials in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).[3] Its purpose is not to redress the injury to the search and seizure victim's privacy; reparation comes too late for that. *See Linkletter v. Walker*, 381 U.S. 618, 637, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601 (1965). Rather, "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, *supra*, 414 U.S. at 347, 94 S.Ct. at 619-20. *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L.Rev. 579, 646 (1968). As Justice Stewart pointed out in *Elkins v.*

3 The rule currently is steeped in considerable controversy and is being critically questioned by both courts and commentators. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), *United States v. Cruz*, 5 Cir., 1977, 559 F.2d 300; Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U.Pa.L.Rev. 378 (1964); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi.L.Rev. 665 (1970); McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J.Crim.L.C. & P.S. 266 (1961).



*United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.

*Accord, Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968).

Under the exclusionary rule, evidence obtained in violation of the fourth amendment cannot be used in a criminal trial against the victim of the illegal search and seizure. The Constitution does not require this remedy; it is a doctrine of judicial design. Excluded evidence oftentimes is quite reliable and the "most probative information bearing on the guilt or innocence of the defendant." *Stone v. Powell*, *supra*, 428 U.S. at 490, 96 S.Ct. at 3050. Nonetheless, the rule's prohibition applies to such direct evidence as well as to "fruit of the poisonous tree" — secondary evidence derived from the illegally seized evidence itself. *Wong Sun v. United States*, *supra*; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). *See* 18 U.S.C. § 2518(10)(a) (authorizing the suppression of any unlawfully intercepted wire or oral communication and the evidence derived therefrom). However, as Justice Brennan observed in *Wong Sun*,

> [w]e need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal ac-

> tions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. at 487-88, 83 S.Ct. at 417, *quoting* Maguire, *Evidence of Guilt* 221 (1959). Thus, once a defendant demonstrates that the Government discovered evidence through an illegal search and seizure, the court must exclude it unless the Government satisfies one of two exceptions:

> First, the connection between the lawless conduct of the police and the discovery of the challenged evidence may "become so attenuated as to dissipate the taint." *Nardone v. United States*, 1934, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307. *See Williams v. United States*, 5th Cir. 1967, 382 F.2d 48. . . .
>
> The second means for "purging the taint" is discovering the same evidence from an "independent source." *Silverthorne Lumber Co. v. United States*, 1920, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319. *See, e.g., Agius v. United States*, 5th Cir. 1969, 413 F.2d 915.

*United States v. Castellana*, 5 Cir., 1974, 488 F.2d 65, 67, *rev'd on other grounds*, 5 Cir., 1974, 500 F.2d 325 (*en banc*). *See Wong Sun v. United States*, *supra*, 371 U.S.



at 487, 83 S.Ct. at 417; Note, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria*, 115 U.Pa.L.Rev. 1136, 1137-38 (1967).

The evidence which defendants contest in this case as fruit of the poisonous tree falls squarely within both of these exceptions. We reach this conclusion in part on the basis of the sound advice in *Williams v. United States*, 5 Cir., 1967, 382 F.2d 48, 51:

> [T]he significance of the nexus between an illegal search and challenged evidence is one of common sense, . . . to be considered under the facts and circumstances of the particular case.

*See Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939); *United States v. Evans*, 8 Cir., 454 F.2d 813, 818, *cert. denied*, 406 U.S. 969, 92 S.Ct. 2423, 32 L.Ed.2d 668 (1972). The facts and circumstances of this case indicate first that the evidence used to convict Houltin and Phillips came from a source independent of the illegal wiretaps. It is undisputed that the D.E.A. agents knew the identity of the four codefendants for several years before the illegal wiretaps.[4] The Government did not, however, at that time know all the details of defendants' and codefendants' smuggling operation. In the first trial, both probable cause to arrest and evidence to convict all of

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4 In defendants' first appeal we noted that "[f]or several years before their arrests, the defendants-appellants, Martin W. Houltin, Robert Burke, Duane Morrison, Michael Francis, Kenneth B. Phillips, and Kenneth J. Croucher, had been under extensive investigation for narcotics smuggling activities." *United States v. Houltin, supra*, 525 F.2d at 945. Their arrests were on October 12, 1973, and the illegal wiretaps were placed between September 27 and October 12, 1973. *Id.* at 947-48.

the conspirators came from the illegal wiretaps. This is not true with respect to the second trial of defendants Houltin and Phillips. In that proceeding the wiretaps played no part. There the overwhelming evidence of defendants' guilt was derived solely from their codefendants' stipulated testimony. This testimony came not from the wiretaps but from codefendants' own intimate knowledge of the marijuana smuggling operation in which they participated with defendants. That the Government knew first of the events and activities testified to as a result of the wiretaps is not decisive. The testimony constitutes an independent source. *See United States v. Marder*, 5 Cir., 1971, 474 F.2d 1192, 1196; *United States v. Holsey*, 10 Cir., 1970, 437 F.2d 250, 253.

We also find that the evidence derived from the four codefendants' testimony had " 'become so attenuated as to dissipate the taint' " of the illegal wiretaps. In *United States v. Marder, supra*, at 1196, this Court observed:

> [T]he type of evidence seized will undoubtedly determine the circumstances that must be considered in determining whether the original taint has been so attenuated, that its exclusion is no longer mandated. Several factors should be considered in deciding whether the attenuation rule is applicable to "live testimony." The unpredictability of the human will, which is necessarily involved in the use of a witness to prove essential elements of a crime, forecloses the adoption of any rigid rules.



One such factor is proof that the witness has come forward "by his own volition, regardless of his identification by the illegal search." *Id., citing United States v. Hoffman*, 7 Cir., 1967, 385 F.2d 501, 504, *cert. denied*, 390 U.S. 1031, 88 S.Ct. 1424, 20 L.Ed.2d 288 (1968). Another is "evidence that the witness was completely uncooperative when originally discovered by the illegal search but later changed his attitude and supplied the necessary information." *Id., citing Smith v. United States*, 1963, 117 U.S.App.D.C. 1, 4, 324 F.2d 879, 882.

Both factors are present in this case. Defendants make much of the fact that the Government compelled codefendants' testimony by granting them use immunity. Houltin and Phillips assert that codefendants did not want to testify and did so only because their attorney advised them they had no other legal alternative. This, however, indicates only that their testimony was not volunteered; it does not necessarily render it involuntary. It is true that had the four codefendants refused to testify, they would have risked being cited for contempt. It also is possible that such refusal might have adversely affected their pending motions for reduction of sentence under Fed.R.Crim.P. 35. On the other hand, the codefendants could have reasoned that their truthful testimony might enhance the possibility that the court would grant their Rule 35 motions. In short, codefendants' choice may have been hard, but it was a choice nonetheless. One source of attenuation, then, is to be found in the exercise of the codefendants' own wills. *See Brown v. United States*, 1966, 126 U.S.App.D.C. 134, 139, 375 F.2d 310, 315, *cert. denied*, 388 U.S. 915, 87 S.Ct.

2133, 18 L.Ed.2d 1359 (1967); Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. Rev. 32, 61-80 (1967).

Similarly, the fact that Burke, Morrison, Francis, and Croucher originally were uncooperative, pleading not guilty and contesting the Government's charge that they were coconspirators in a massive marijuana smuggling operation, but later changed their attitude and testified to the truth of that which they had previously challenged, also points to attenuation. In this sense the instant case is much like *Smith v. United States, supra*. There the D.C. Circuit found that the testimony of a government eyewitness, whose identity was learned from defendants during their illegal detention, was not fruit of the poisonous tree because the taint had become attenuated. As evidence of attenuation, the court noted the fact that "when initially located [the eyewitness] gave no information adverse to appellants; only after reflection and the interaction of [his] faculties of human personality did [he] eventually relate to the jury the events of the night of the killing." *Id.* 117 U.S.App. D.C. at 4, 324 F.2d at 881-82 n.2. Writing for the majority, then Circuit Judge Burger stated:

> [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence.



*Id.* 117 U.S.App.D.C. at 3, 324 F.2d at 881-82.

Our final reason for holding that the evidence derived from codefendants' testimony is not fruit of the poisonous tree goes to the very underpinnings of the exclusionary rule itself. Judge Wisdom, in the opinion in the first appeal of this case, correctly observed that

> [e]vidence should be excluded only where the benefit accruing to society from the additional deterrent against unlawful police practices equals or exceeds the detriment to society caused by the release of criminals.

*United States v. Houltin, supra*, 525 F.2d at 947. We agree. This Court is not convinced that the additional benefits of extending the exclusionary rule to the circumstances presented by this case would justify the resulting further encroachment upon the public interest. *See, e.g., United States v. Calandra, supra*, 414 U.S. at 351, 94 S.Ct. at 621; *Alderman v. United States, supra*, 394 U.S. at 174-75, 89 S.Ct. at 967.[5] And even if we were so convinced, we still would be reluctant "to so extend the exclusionary rule in light of the current

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5 [U]se of the exclusionary rule as a means of controlling police practices is not without social cost. Regardless of the amount of unlawful police conduct which takes place, it is generally only those cases in which the unlawful conduct discloses strong evidence of guilt which reach the courts. Consequently, application of the doctrine of exclusion in any particular case usually means the release of a guilty individual. This result is wholly undesirable and should be minimized whenever possible. Exclusion is not intended to redress a wrong to the defendant by releasing him, but is designed only to curb undesirable police conduct. Therefore, complete immunity goes too far.
Note, *supra*, 115 U.Pa.L.Rev. at 1137.

debate in the United States Supreme Court about the proper role of the exclusionary rule when one must balance between deterring police misconduct and protecting society by using reliable evidence to convict criminal offenders." *United States v. Cruz, supra, citing Stone v. Powell, supra.*

### *II. Double Jeopardy*

Defendants' second contention is that the Double Jeopardy Clause of the fifth amendment prevents their retrial because the entire evidence used to convict them resulted from illegal wiretaps. Thus, according to defendants, our previous reversal of their convictions because of these wiretaps was a finding of insufficiency of the evidence and we should have remanded their case with directions to dismiss the indictment.

The Double Jeopardy Clause protects an accused from government harassment by multiple prosecutions for the same offense. *See, e.g., Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Balanced against this right of the accused is society's interest "in fair trials designed to end in just judgments," *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), a balance that generally allows the Government to try a successful appellant again. *See, e.g., Bryan v. United States,* 338 U.S. 552, 560, 70 S.Ct. 317, 321, 94 L.Ed. 335 (1950); *State of Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 462, 67 S.Ct. 374, 375, 91 L.Ed. 422 (1947); *Ball v. United States,* 163 U.S. 662, 671-72, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896). Justice Harlan, in *United States v. Tateo,* 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964), explained the rule this way:



> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Like many general rules developed by balancing conflicting considerations, this rule of double jeopardy has exceptions. One such exception is that the Government may not retry a successful appellant if his reversal results from a finding of insufficiency of the evidence, if the Government can produce no additional evidence, and if the defendant did not move for a new trial in the district court. *See Forman v. United States,* 361 U.S. 416, 425-26, 80 S.Ct. 481, 486-87, 4 L.Ed.2d 412 (1960); *Sapir v. United States,* 348 U.S. 373, 374, 75 S.Ct. 422, 423, 99 L.Ed. 426 (1955); *Bryan v. United States, supra,* 338 U.S. at 559-60, 70 S.Ct. at 321; *United States v. Perez,* 5 Cir., 526 F.2d 859, 863 n.3, *cert. denied,* 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed.2d 118 (1976); *United States v. Apollo,* 5 Cir., 1973, 476 F.2d 156, 158; *United States v. Robinson,* 5 Cir., 1972, 468 F.2d 189,

194; *United States v. Musquiz*, 5 Cir., 1971, 445 F.2d 963, 966; *United States v. Goodson*, 5 Cir., 1971, 439 F.2d 1056; *United States v. Nall*, 5 Cir., 1971, 437 F.2d 1177, 1187.

Defendants Houltin and Phillips contend that their case falls within this exception. The record and the law indicate otherwise. A careful reading of this Court's opinion in defendants' first appeal clearly establishes that we grounded the reversal of their convictions upon a procedural defect in the trial court — the admission of evidence resulting from the illegal wiretaps. At no point in our opinion did we state that there was insufficient evidence to convict defendants. Indeed, when defendants, after denial on retrial of their motion to dismiss the indictment, sought clarification from this Court on this same double jeopardy issue, we granted the motion for clarification and, in our order dated April 1, 1976, stated that the Government "may reprosecute the appellants Houltin and Phillips, but may not use fruits of the wiretaps that we have declared illegal."

It is axiomatic that the fifth amendment Double Jeopardy Clause does not prohibit the Government from retrying a defendant whose conviction has been set aside on procedural grounds. *See, e.g., United States v. Ewell*, 383 U.S. 116, 121, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966); *United States v. Tateo, supra; Forman v. United States, supra; Thomas v. United States*, 5 Cir., 1971, 450 F.2d 317, *cert. denied*, 409 U.S. 859, 93 S.Ct. 143, 34 L.Ed.2d 104 (1972); *United States v. Jasso*, 5 Cir., 442 F.2d 1054, *cert. denied*, 404 U.S. 845, 92 S.Ct.



146, 30 L.Ed.2d 81 (1971). That is the case here. Defendants' argument therefore is without merit.[6]

### *III. Conclusion*

Justice Holmes, in one of his typically well-reasoned dissents, commented:

> It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

*Hyde v. United States*, 225 U.S. 347, 391, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912) (Holmes, J., dissenting). This, we think, is particularly true with respect to the fruit of the poisonous tree doctrine, and, to a lesser but still very real extent, the often heard cry of double jeopardy. On their face, defendants' assertions of tainted evidence and multiple prosecutions may seem meritorious. Careful, reasoned analysis demonstrates otherwise. This Court has never tolerated the violation of anyone's constitutional rights, particularly those of a criminal accused; our vindication has been

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6 Defendants in their brief point to *United States v. Robinson, supra*, as further authority for their double jeopardy claim. In that case this Court reversed the convictions of two defendants convicted solely upon evidence gleaned from two illegal wiretaps. On the basis of *United States v. Musquiz, supra*, we remanded the case to the district court with directions to dismiss the indictment because the defendants did not move the trial court for a new trial and because "the entirety of the evidence used to convict these defendants is conceded to have eventuated from these improperly authorized wiretaps." 468 F.2d at 194. In the instant case, however, the Government made no such concession and upon retrial once again produced overwhelming evidence of defendants' guilt. *Robinson*, therefore, is inapposite to this appeal.

swift and hard. But in this case, there were no such violations.

The judgment of the district court is AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion at best renders meaningless and at worst overrules, without an en banc hearing, a decision of another panel of this Court, *United States v. Houltin*, 5 Cir. 1976, 525 F.2d 943, *vacated in part sub nom., Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745, *modified* 5 Cir. 1977, 553 F.2d 991 (*Houltin I*). In *Houltin I* we reversed the convictions of Houltin and Phillips because government agents, both federal and state, violated the fourth amendment by using illegal wiretaps; the two defendants, unlike their convicted coconspirators, had standing to challenge the inadmissible evidence. Here, by granting immunity to the four convicted coconspirators, who were then in effect compelled to testify to the same evidence excluded in the earlier case, the prosecution erased the holding in *Houltin I* as to Houltin and Phillips, the two defendants-appellants in this case.

This case does not fall within the recognized exceptions to the exclusionary rule, a rule offensive to one's sense of justice in many cases, but a rule that makes the fourth amendment meaningful over the long term. First, I cannot accept the majority's conclusion that the coconspirators' coerced testimony in this case came from a source independent of an admittedly illegal wiretap.[1] Second, the connection between the

1 The government did not contest on appeal the district court's ruling that a wiretap of a conversation between Houltin and his wife and another between Mrs. Houltin and Mrs. Phillips were unlawful. *United States v. Houltin*, 5 Cir. 1976, 525 F.2d 943, 945.



evidence introduced and the primary illegality had not become so attenuated as to dissipate the taint. The majority has ignored the purposes of the exclusionary rule and the doctrine of the fruit of the poisonous tree, and has given law enforcement authorities a substantial inducement to use unauthorized wiretaps in future investigations.

The majority does not rely on a per se rule that witness testimony can never be tainted. After the leading case of *Wong Sun v. United States*, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, some decisions supported that view. *Smith and Bowden v. United States*, D.C. Cir. 1963, 324 F.2d 879; *Brown v. United States*, 1967, 126 U.S.App. D.C. 134, 143, 375 F.2d 310, 319 (Burger, J., concurring) *cert. denied*, 1967, 388 U.S. 915, 87 S.Ct. 2133, 18 L.Ed.2d 1359. But a per se approach did not become the law. Instead, witness cases involving live testimony are to be analyzed as any other derivative evidence cases are analyzed. *United States v. Marder*, 5 Cir. 1973, 474 F.2d 1192, 1196; *see generally* Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L.Rev. 32 (1967).[2]

2 The majority points to the advice in *Williams v. United States*, 5 Cir. 1967, 382 F.2d 48, 51 that "the significance of the nexus between an illegal search and challenged evidence is one of common sense . . ." This is sound advice, but it can be misunderstood. In derivative evidence cases it is not unusual for the defendant's counsel to offer sophisticated argument to show a causal connection between information obtained through illicit wiretapping and the government's proof; and, of course, appellate courts should scrutinize such arguments. *Nardone v. United States*, 1939, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307. "Common sense", if it has judicial acceptance in this context, may cut through a lawyer's quiddities to show that a connection is less significant than the lawyer asserts. *Id.* But what seems "common sense" to individual

Evidence that is fruit of the poisonous tree is excluded, as Justice Holmes, speaking for the Court, said, because the essence of exclusionary rule is not merely "that . . . evidence so acquired shall not be used before the Court but that it shall not be used at all". *Silverthorne Lumber Co. v. United States*, 1920, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 321. The government may avoid the exclusionary rule for derivative evidence if it can show either that the evidence came from an independent source or that the relation of the evidence to the primary illegality is so attenuated that the taint is dissipated. *United States v. Castellana*, 5 Cir. 1974, 488 F.2d 65, 67 *rev'd on other grounds*, 5 Cir., 500 F.2d 325 (en banc.).

The facts and circumstances of this case do not fit within the independent source exception to the derivative evidence exclusionary rule. *Wong Sun* established that evidence is not fruit of the poisonous tree simply because it would have been undiscovered *but for* the primary illegality by the police. *Wong Sun* did not, however, reject a "but for" inquiry entirely. That inquiry survives as the controlling question for the independent source exception. Ruffin, 15

judges cannot be used as a substitute for accepted standards, rules, policies, and principles. It is certainly no substitute for consideration or analysis of the logical relationship between evidence obtained by an illegal wiretap and the exploitation of the evidence to convict defendants. In the context of this and similar cases, "common sense" should serve as a check on the specious reasoning defendants' imaginative counsel devise for sophistical causation, not as the primary basis for decision. Otherwise, the fate of a criminal defendant varies with the vagaries of the judges who happen to review his case. *Cf. Adamson v. California*, 1947, 332 U.S. 46, 68, 67 S.Ct. 1672, 91 L.Ed. 1903 (Black, J., dissenting) (warning of the danger of allowing judges to substitute their own concepts of decency and fundamental justice for the language of the Bill of Rights).



U.C.L.A.L.Rev. at 38. Evidence has an independent source when the prosecution can show it was uncovered in a manner with no connection at all to the primary illegality such as wiretapping. *See, e.g., United States v. Villarreal*, 5 Cir. 1978, 565 F.2d 932 (Wisdom, J., dissenting); *United States v. Castellana*, 5 Cir. 1974, 488 F.2d 65, *rev'd on other grounds*, 5 Cir. 1974, 550 F.2d 325 (en banc); *United States v. Bacall*, 9 Cir. 1971, 443 F.2d 1050, *cert. denied*, 404 U.S. 1004, 92 S.Ct. 565, 30 L.Ed.2d 557; *Collins v. Beto*, 5 Cir. 1965, 348 F.2d 823, 828.

*United States v. Holsey*, 10 Cir. 1970, 437 F.2d 250, a case cited in the majority opinion, serves as an example. In *Holsey*, the police had illegally searched the defendant's rented house and his automobile. The police found evidence of an automobile purchase by someone using the name Jack Weber which would have advanced their investigation had the police not already known all the facts the evidence revealed. The court refused to hold that testimony by witnesses uncovered by the investigation was tainted. It stressed that "such knowledge obtained by the search gave the F.B.I. Agents no information they did not have before . . ." 437 F.2d at 253.[3] One commentator, who emphasizes the need for special care when law enforcement officials have used unlawful electronic surveillance, believes that the independent source exception should be available in wiretapping cases only when the government can establish "that its agents had utilized that source before gaining knowledge by

3 *United States v. Marder*, 5 Cir. 1973, 474 F.2d 1192, the other case cited by the majority, states the independent source exception but did not admit any evidence because of it.

the unlawful method". Pitter, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Cal.L.Rev. 579, 645 (1968).

Against this legal background it is clear to me that the independent source rule does not permit use of the testimony of the convicted coconspirator. The government did not have a fruitful source for the evidence before the taps. Although the federal agents knew the identities of all the conspirators, they had been unable to develop a case. Indeed, this inability to prove their case caused the investigators to place the illegal wiretap. *Houltin I*, 525 F.2d at 947.

Furthermore, there are several important connections between the primary illegality and the testimony introduced at the second trial. The witnesses had been confronted with the results of the tap; inevitably this influenced the content of their testimony. *See generally* Pitter, 56 Cal.L.Rev. at 592-93, *cf. Grant v. Wainwright*, 5 Cir. 1974, 496 F.2d 1043, 1048 n.5 (repetition may lead witness to believe his own false confession). The prosecution exploited the wiretaps in its grant of immunity to compel the testimony. Only because of the wiretap evidence did the prosecutor have available four witnesses who could be "immunized" without cost. They were already convicted, so an inability to use their testimony against them was meaningless. The government might have convicted Houltin by immunizing Phillips or vice-versa. Either of those grants of immunity, however, would have required



paying the usual costs of the immunity procedure.[4] The information from the wiretaps made those convictions possible. Moreover, the information from the wiretaps determined who had standing in *Houltin I*. This in turn identified the witnesses to be given immunity. *Cf. United States v. Marder*, 474 F.2d at 1195; *United States v. Tane*, 2 Cir. 1964, 329 F.2d at 848, 853 (testimony of witness identified through illegal tap is tainted).[5]

Because a but-for causal link exists between the unlawful wiretap and the testimony introduced at trial, that evidence could be considered only if it had become so attenuated from the unlawful tap that the taint was dissipated. *See Wong Sun v. United States*, 371 U.S. at 487-88, 83 S.Ct. 407, *Nardone v. United States*, 308 U.S. at 341, 60 S.Ct. 266. The majority believes the evidence is attenuated because the coconspirators came forward by their own volition and because they changed from uncooperative defendants to prosecution witnesses.

The majority thus adopts the will and volition approach to tainted witnesses. Attenuation is supplied by the human factor involved when evidence comes from witness testimony. Courts employing this

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4 The government might also have immunized Burke, Morrison, Francis, and Croucher before the first trial. That course, however, also might have kept some of the conspirators out of jail.

5 Houltin and Phillips do not have standing to complain for their coconspirators that the immunity grants were improper. They do have standing, however, to protest any use of the illegal wiretaps which leads to evidence against them, including use of the wiretaps to create the possibility of meaningless immunity and compelled testimony.

analysis "must determine how great a part the particular manifestation of 'individual human personality' played in the ultimate receipt of the testimony in question." *McLindon v. United States*, 1964, 117 U.S.App.D.C. 283, 286, 329 F.2d 238, 241 n.2. "The point to scrutinize, then, is . . . between the ears of the witness" Ruffin, 15 U.C.L.A.L. Rev. at 50. This approach has been criticized — in an article Judge Gewin termed "excellent" in *United States v. Marder*, 474 F.2d at 1196 n.4 — because it is vague, "spurious and unnecessary", and so manipulable that any decision can be justified. Ruffin, 15 U.C.L.A.L.Rev. at 39, 64. It has, however, been accepted to some extent in this Circuit. *See United States v. Marder*, 474 F.2d at 1196.

Even within the framework of the will and volition analysis, I cannot understand how the majority concludes that the testimony below resulted from an independent human decision to testify. The government has the burden of showing the evidence is attenuated. *Houltin I*, 525 F.2d at 947. The witnesses did not come forward voluntarily;[6] they were arrested, tried, convicted, and then ordered to testify. They had no choice but to obey that order to give evidence; the alternative was a contempt citation, as their lawyer so advised them.

To negate the obvious coercion to testify — coercion made possible by exploitation of the illegal wiretaps

6 The majority sees a distinction between "volunteered" testimony and "voluntary" testimony. The editors of Webster's Third International Dictionary would not agree. Their definition of "volunteer" is "to offer or bestow *voluntarily* or without solicitation or compulsion". (Emphasis added.)



— the majority can only speculate that the co-defendants chose to testify to enhance the possibility that their then-pending Rule 35 motions for a reduction of sentences would be granted. Of course, the co-defendants had sentences to be reduced only because of wiretap evidence. It is just as easy, as the majority concedes, to conclude that their fear that failure to testify would have an adverse impact on the Rule 35 motions increased the coercion on the defendants.

The majority does not cite any support in the record for its theory that attenuation can be found in the exercise of the co-defendants' own wills, for there is none. To the contrary, in the record the United States Attorney stated "none of the four [witnesses] want to testify but they recognize under the law they have an obligation to do so".[7] Transcript at p. 28. The trial judge acknowledged that the witnesses "don't want to testify". *Id.* at 33.

The majority's argument that attenuation is shown because Burke, Morrison, Francis, and Croucher changed from uncooperative to cooperative parties is similarly contradicted by the United States Attorney's statement.[8] The four never wanted to cooperate by testifying. *Cf. Smith and Bowden v. United States*, 1965, 120 U.S. App.D.C. 160, 344 F.2d 545 in which the

7 Webster's Third International Dictionary defines "voluntary" as "proceeding from the will: produced in or by an act of choice . . . acting or done *without any present legal obligation* to do the thing done or any such obligation to do the thing done or any such obligation that can accrue from the existing state of affairs". (Emphasis added.)

8 Even if the attitude of the witnesses had changed, I do not believe this would prove that the evidence was so attenuated as to dissipate the taint of the wiretap. *See* Ruffin, 15 U.C.L.A.L.Rev. at 54-55.

court excluded the testimony of a tainted witness who did not change from uncooperative to cooperative, but who was always cooperative. In contrast, in *Smith v. United States*, cited by the majority, the witness changed his story voluntarily, without coercion of contempt.

As the majority points out by quoting Mr. Justice Holmes, reliance on phrases such as "independent" or "attenuated" can lead to superficial legal analysis. One means of avoiding the danger in a derivative evidence case is also to analyze its facts in light of the policy behind the exclusionary rule of deterring official misconduct. *See* Note, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria*, 115 U.Pa.L.Rev. 1136 (1967).

My conclusion that the testimony in the case is tainted is buttressed by an examination of the case from this perspective. Allowing this evidence to be introduced will not deter official misconduct; it will encourage illegal wiretaps. After this decision, a government agent investigating a conspiracy case who could not obtain permission to use a wiretap (or who did not seek permission) could place an unlawful tap on one conspirator's telephone, wait until he overheard an incriminating call to which at least one conspirator lacked standing to attack, and use the call to convict that defendant. After the conviction, that defendant would be granted immunity. He would then be forced to testify against the other conspirators. The wiretap in this case was unlawful only because the investigator failed to comply with a technical require-



ment of 18 U.S.C. 2516(2).[9] Nothing in the majority opinion, however, restricts the loophole to good faith misconduct.

The majority ignores this difficulty. Instead, it states its reluctance to extend the exclusionary rule. To my mind, to exclude the testimony in this case would not extend the exclusionary rule, but apply it in exactly the situation the Supreme Court has said exclusion is appropriate: when necessary to control official unlawfulness. *See Stone v. Powell*, 1976, 428 U.S. 465, 96 S.Ct. 3037, 3047-49, 49 L.Ed.2d 1067. That no court has ever excluded evidence in a comparable fact situation does not mean a decision to exclude would extend the exclusionary rule. It probably means that no prosecutor has ever dared to attempt to use the procedure sanctioned by the Court today.

Finally, I am concerned that two of three judges on the panel in this case, in effect, eradicate the holding of this Court in *Houltin I* — with respect to Houltin and Phillips. In *Houltin I* this Court held that Houltin and Phillips had standing to challenge the unlawful taps, and reversed their convictions. That standing is now an empty privilege. The majority here holds that a defendant with standing against the primary illegality can do nothing when the government exploits the tainted evidence not only to convict defendants without standing but to convict the defendant with standing by compelling those without standing to testify. There is no longer any reason for a member of a conspiracy to exercise his right as an individual

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9 See footnote 1 of the majority opinion.

citizen to protest an unlawful wiretap — unless all members of the conspiracy share his standing.

Houltin and Phillips may be guilty. Ringleaders in a criminal conspiracy have a way of interposing layers of less important conspirators between the criminal offense and the hard proof of the ringleaders' guilt. *See Houltin I*, 525 F.2d at 951-52. But there is no legitimate evidence here that is admissible against the defendants.

> It is indisputably a policy of our society that criminals be speedily apprehended and justly convicted. But in pursuing this aim we must sedulously avoid prejudicing other, and higher goals. One such goal is certainly a cutting down of the incidence of unlawful conduct against private persons by public officials.

*Collins v. Beto*, 348 F.2d at 831. The testimony of Burke, Morrison, Francis, and Croucher was tainted by the wiretap.

The "exclusion of relevant criminal evidence is a high price to pay for judicial enforcement of the fourth amendment."[10] But the admission into evidence of the products of unconstitutional searches (wiretaps) as a means of convicting once-tried defendants whom the prosecutor considers should be retried and convicted can only induce official unconstitutional searches. I would reverse.

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10 Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 433 (1974).



UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

April 10, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-4107 — U.S.A. v. MARTIN WILLARD HOULTIN and KENNETH B. PHILLIPS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing on behalf of appellants, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

bmh

cc: Mr. Joseph S. Chagra
Mr. Billy Ravkind
Ms. LeRoy Morgan Jahn
Mr. Jeremiah Handy

## APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

versus

Martin W. HOULTIN, Robert Burke,
Duane Morrison, Michael Francis,
Kenneth B. Phillips and
Kenneth J. Croucher,
Defendants-Appellants.

No. 74-4144.

United States Court of Appeals,
Fifth Circuit.

Jan. 12, 1976.

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Appeal from the United States District Court for the Western District of Texas.

Before JONES, WISDOM and AINSWORTH, Circuit Judges.

WISDOM, Circuit Judge:

This case presents two serious questions. (1) Were the arrests of alleged importers of marijuana procured through the exploitation of illegal wiretaps?



(2) Were the convictions for both conspiracy to import and conspiracy to possess the drug, despite the existence of only one conspiratorial agreement, in violation of the defendants' protections against double jeopardy?

For several years before their arrests, the defendants-appellants, Martin W. Houltin, Robert Burke, Duane Morrison, Michael Francis, Kenneth B. Phillips, and Kenneth J. Croucher, had been under extensive investigation for narcotics smuggling activities. Agents of the State of New Mexico applied to a state court for authorization to intercept telephone communications from Houltin, Morrison, and Burke. The court granted the request and, later, a request for an extension of the authorization. Two of the intercepted telephone calls allegedly indicated that the conspirators had arranged to meet at the Columbus, New Mexico airport at a given time. The dogged surveillance of the agents led them to Mexico, where Houltin, Morrison, and Burke picked up 2260 pounds of marijuana and returned to New Mexico. There, all the defendants were arrested and the marijuana seized.

After their arrests, the defendants entered pleas of nolo contendere to various state charges, and each was assessed an 18-month probated sentence and fined $1,000 by a New Mexico state court. Five months later they were indicted by a federal grand jury for alleged violations growing out of the same acts that were the subject of the state charges. The district judge found that the state wiretaps were illegal and granted the defendants' motion to suppress the evidence obtained

from those wiretaps.[1] In his pretrial order, the trial judge stated that in his opinion the wiretaps did not contribute to the apprehension of the defendants or to the seizure of the marijuana they were transporting, but he left this question to be decided by the jury. He denied, however, the motion to suppress the marijuana. The jury, after being instructed to find beyond a reasonable doubt that the arrests would have occurred even without the wiretaps, found each defendant guilty of two conspiracy counts. The trial judge sentenced each to consecutive five-year terms of imprisonment on each count and imposed varying fines on the defendants.

I.

All the defendants contend that their arrests and the seizure of the marijuana were fruits of the illegal wiretaps which fatally infected their convictions. The two wiretaps that the district court found illegal — a finding that the government does not now challenge — were of a telephone conversation between Houltin and his wife and another between Mrs. Houltin and Phillips's wife. First, we must determine who has standing to challenge the legality of the wiretaps. Second, we must determine whether the arrests and the imported marijuana were obtained through exploitation of the illegal wiretaps.

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1 The wiretaps were held illegal apparently because of noncompliance with 18 U.S.C. § 2516(2), which requires the "principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof" to apply to a state court judge for an order authorizing a wiretap. The wiretap applications in this case were signed only by an assistant district attorney.



A. Standing

The government argues that only Houltin has standing to make the challenge. This argument overlooks the second telephone conversation, the one between Mrs. Houltin and Mrs. Phillips. This call was also an integral part of the investigation leading to the arrests. In *Alderman v. United States*, 1969, 394 U.S. 165, 176, 89 S.Ct. 961, 968, 22 L.Ed.2d 176, 188, the Supreme Court held that "any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance . . . if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, *whether or not he was present or participated in those conversations*". (Emphasis supplied). Since Mrs. Phillips, a participant in the second wiretapped conversation, was speaking from defendant Phillips's home, *Alderman* grants him standing to challenge the legality of that wiretap and the admission of evidence to which it led the government.

This leaves open the question whether the other four defendants, who were not participants in the intercepted conversations and who did not own the property on which the intercepted calls were placed, have standing to challenge the legality of the wiretaps.

In a recent case this Court studied the Fourth Amendment law of standing, from the enactment of the amendment to present times. We stated the relevant test as follows:

> [D]efendants must demonstrate a 'legitimate interest' of some kind in the premises

> searched or the objects seized. . . . [T]he decisive factor in determining whether a search or seizure is 'reasonable' for Fourth Amendment purposes is whether the complaining party's reasonable expectations of privacy have been unreasonably disturbed.

*United States v. Hunt*, 5 Cir. 1974, 505 F.2d 931, 939-40, cert. denied, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466.

Burke, Morrison, Francis, and Croucher had no reasonable expectation of privacy in the wiretapped conversation their coconspirator Houltin had with his wife and that which Mrs. Houltin had with Mrs. Phillips. Indeed, in the recent case of *United States v. Scasino*, 5 Cir. 1975, 513 F.2d 47, 50, we indicated that such a privacy interest may only be asserted by "one who participated in the intercepted conversation or on whose premises the conversation occurred".[2] And in *Alderman*, 394 U.S. at 171-72, 89 S.Ct. at 965, 22 L.Ed.2d at 185-86, the Supreme Court stated in unambiguous terms:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.[3]

2 We also obtain guidance from *United States v. Garcilaso de la Vega*, 2 Cir. 1974, 489 F.2d 761. In that case the government used an illegal wiretap in an investigation of the marijuana trafficking of Juan Santos. The intercepted conversation that was the subject of a motion to suppress was between Santos and a third party and led to the apprehension of the appellant, who was Santos's supplier. The court denied standing to the appellant because his phone was not tapped and he was not a party to the intercepted conversation. As in the present case, it was foreseeable to the police that the information obtained from the wiretap would lead to the apprehension of the appellant, who was a coconspirator of the party whose phone was tapped.



We hold, therefore, that only Houltin and Phillips have standing to challenge the legality of the two wiretaps at issue.

B. Exclusion of the Tainted Evidence

The "prime purpose" of the Fourth Amendment exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures". *United States v. Calandra*, 1974, 414 U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561, 571. The essence of that rule is not merely "that . . . evidence so acquired shall not be used before the Court but that it shall not be used at all".[4] *Silverthorne Lumber Company v.*

3 According to Fed.R. Crim.P. 41(e) and 18 U.S.C. § 2518(10)(a), an "aggrieved person" may move to suppress evidence derived from an illegal wiretap. The statutory phrase does not liberalize the common law of standing. *See United States v. Calandra*, 1974, 414 U.S. 338, 348, n. 6, 94 S.Ct. 613, 38 L.Ed.2d 561. That phrase is defined in 18 U.S.C. § 2510(11) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed". Moreover, in *Alderman*, 394 U.S. at 175, n. 9, 89 S.Ct. at 968, the Court held that " 'aggrieved person' should be construed in accordance with existent standing rules".

4 This rule is codified in 18 U.S.C. § 2518(10)(a), which authorizes the suppression of "the contents of any [unlawfully] intercepted wire or oral communication, *or evidence derived therefrom* . . . ." (emphasis supplied). This "fruit of the poisonous tree" doctrine "is a response to the realization that if police officers are permitted to use knowledge gained from unlawfully obtained evidence to obtain the same or other valuable evidence legally, an inducement to commit such unlawful practices continues to exist". Comment, Fruit of the Poisonous Tree — A Plea for Relevant Criteria, 115 U.Pa.L.Rev. 1136, 1138 (1967).

*United States*, 1920, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 321. The determination whether information gained by the police in an illegal search was used to obtain other evidence against the accused is not based upon whether the subsequent evidence would not have come to light but for the illegal actions of the police, but rather upon "whether, granting establishment of the primary illegality, the evidence to which [the] objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint". *Wong Sun v. United States*, 1963, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455, *quoting* Maguire, Evidence of Guilt 221 (1959).

Evidence should be excluded only where the benefit accruing to society from the additional deterrent against unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. Hence, two exceptions to the exclusionary rule of *Silverthorne* have developed. *See* Comment, Fruit of the Poisonous Tree — A Plea for Relevant Criteria, 115 U.Pa.L. Rev. 1136, 1138 (1967). We set out these two exceptions in *United States v. Castellana*, 1974, 488 F.2d 65, 67, *rev'd on other grounds*, 500 F.2d 325 (en banc): "First, the connection between the lawless conduct of the police and the discovery of the challenged evidence may 'become so attenuated as to dissipate the taint.' *Nardone v. United States*, 1939, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312. . . . The second means for 'purging the taint' is discovering the same evidence from an 'independent source.' [*Silverthorne*, 251 U.S. at 392, 40 S.Ct. 182]".



It was established in *Nardone*, 308 U.S. at 341, 60 S.Ct. at 267, 84 L.Ed. at 311, that the accused has the burden of proving both that the wiretap was unlawfully employed and that a substantial portion of the evidence against him was fruit of that poisonous tree. The prosecution is then given an opportunity to prove that the subsequently obtained evidence falls within one of the recognized exceptions to the exclusionary rule of *Silverthorne*.

In order to determine which party, if either, has carried its burden, it will be necessary to construct a detailed account of the events leading to the arrests. In December 1971, Operation Sky Night began. This was a joint federal-state investigation sponsored by the Drug Enforcement Administration (D.E.A.) and aimed at the suspected conspiracy of the defendants (among others) to import marijuana into New Mexico by aircraft. By September 1973, the government admitted that its investigation procedures had failed and applied to the state court in New Mexico for authorization to tap the telephones of Houltin, Morrison, and Burke. The application was granted, and the telephones were tapped between September 27 and October 12, 1973.

On the latter date the nearly two-year drought of Operation Sky Night finally came to an end. Gerald Weatherman, an agent-pilot for the D.E.A., had been responsible for the surveillance of the defendants for over a year and a half. On October 12, he observed Houltin, Burke, and Francis leave an El Paso coffee shop at about 1:00 p.m. and proceed toward the Sunland Park Airport, which was just across the New

Mexico border. Weatherman then went to the El Paso International Airport, boarded his aircraft, and flew over the Sunland Park Airport, where he observed the defendants' departure in their planes.

Weatherman was unaware that Houltin had placed a telephone call to his wife from the Sunland Park Airport. He asked her to "call the man . . . [a]nd tell him we're running a little bit late and it'll be about two o'clock". He also told her to cancel their social plans for the evening. His wife then called Mrs. Phillips and told her, in part, "[w]ill you tell your old better half that they're running a little bit late and he'll be in at two o'clock". The reference to two o'clock was apparently the time at which Houltin expected to arrive in Columbus, New Mexico. Tommy Holder, the state police officer who was manning the wiretaps in Columbus, intercepted both of the conversations, which occurred between 1:17 p.m. and 1:23 p.m. Holder then informed "Sector" (the El Paso headquarters of Operation Sky Night) of the substance of the intercepted conversations. The key question in this case is whether the conspirators were subsequently arrested through government exploitation of information obtained from these wiretapped conversations.

The plot continues. Agent Weatherman observed Houltin, Burke, and Francis depart from the Sunland Park Airport at about 1:30 p.m. and followed them in his aircraft to Columbus, where the defendants landed at about 2:00 p.m. Weatherman then returned to the El Paso Airport for refueling, arriving at about 2:30. He testified that he had intended to "relax for a little while" at the airport before returning to Columbus to continue the surveillance. The relaxation was cut



short by a phone call Weatherman received from Sector indicating that "all the people were at the airport at Columbus, so I'd better get back over there, and start surveillance again". Weatherman then left El Paso at about 2:50 and arrived over the Columbus Airport at 3:30, just in time to observe the defendants' departure. He testified that he left the El Paso Airport immediately after receiving the phone call from Sector, and that had he not received that call he would not have arrived in Columbus in time to observe the departure of the defendants. Weatherman then followed the defendants to the location in Mexico where they picked up the marijuana, and then back to New Mexico, where he directed ground forces in the apprehension of the defendants and the seizure of the marijuana.

The above summary of the evidence indicates that the defendants have carried their burden of proving that their apprehension and the marijuana seizure resulted from the exploitation of information gleaned from the illegal wiretaps. The government, in rebuttal, contends that the crucial phone call from Sector to Weatherman was based upon a source independent of the information obtained from the two intercepted telephone conversations. This contention is based on the alleged actions of agent Holder after he intercepted those two conversations and relayed the information to Sector. He then left the wiretap center and went to the Columbus Airport, where he saw the appellants' planes take off at about 3:30.[5] He immediately called Sector to report his observation.

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5 Both the testimony of Sgt. Holder and the report of agent Weatherman filed shortly after these incidents are in agreement that the defendants' planes departed from the Columbus Airport at about 3:30 p.m.

The government argues that the key call from Sector to Weatherman was based on information obtained from the *second* call from Holder to Sector. The times that the various calls were placed reveals the fatal flaw in the government's argument. The key call to Weatherman was placed between 2:30 and 2:50; Holder testified that his second call to Sector was placed after he observed the appellants' planes leave the Columbus airport, which was at about 3:30. It was therefore not possible that the second call from Holder could have been the basis for the call from Sector that Weatherman received at the El Paso Airport. Moreover, Holder's second phone call was placed *after* he observed the defendants' planes depart from the Columbus Airport, but the key call from Sector to Weatherman had to have been placed sufficiently before the defendants' departure to give Weatherman enough time to fly the approximately thirty-minute flight from El Paso to Columbus in time to observe the defendants leave. We therefore conclude that there was no source for the key phone call to Weatherman that was independent of the information gleaned from the illegally intercepted calls.

The government next contends that the arrest of the defendants and the seizure of the marijuana were not achieved through "exploitation" of the illegally monitored conversations because, even without the alert from Sector, agent Weatherman would have returned to Columbus and, after discovering that the defendants had already departed, would have proceeded to Mexico. This argument is based on the "inevitable discovery" doctrine, which this circuit has unambiguously rejected. *Parker v. Estelle*, 5 Cir. 1974,



498 F.2d 625, 629-30 n.12, cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450; *United States v. Castellana*, 488 F.2d at 68.

Finally, the government argues that the intricate work of its agents in tracking the defendants to Mexico and then back to New Mexico and in coordinating the arrests rendered the connection between the illegal wiretaps and the arrests sufficiently attenuated so as to dissipate the taint of those wiretaps. Two recent decisions by this Court illustrate the circumstances in which the "attenuation" exception is applicable. In *United States v. Owen*, 5 Cir. 1974, 492 F.2d 1100, cert. denied, 419 U.S. 965, 95 S.Ct. 227, 45 L.Ed.2d 709, the government illegally searched Owen's car, found a revolver, and then arrested Owen for his possession of the weapon. While at the police station, Owen was told by a postal inspector that he was suspected of mail fraud and was invited to return to discuss the matter. He returned in four days and on several later occasions and eventually confessed and agreed to cooperate with the government's investigation of the mail fraud conspiracy in return for a government recommendation of leniency as to Owen's punishment. Owen later challenged that agreement and certain evidence obtained pursuant to the agreement on the ground that they were tainted by the illegality of the original search of his car. We held that the taint had been dissipated by the time Owen agreed to cooperate in the mail fraud investigation.

In *Parker v. Estelle*, Parker's confession to the killing of his father was suppressed by the trial judge. Before Parker's confession, the Parker family gar-

dener, Morales, had indicated to the police that he saw or heard nothing suspicious at the time of the death. Some time after being informed of Parker's confession, Morales changed his statement, indicating that he heard two gun shots and then saw Parker flee from the scene. The government relied exclusively on this testimony at trial, and Parker was convicted. On appeal, Parker challenged the admission of Morale's testimony, contending that it was the fruit of the invalid confession. We held that whatever connection there may have been between Parker's confession and Morale's testimony was so attenuated as to dissipate the taint.

In both cases the challenged evidence had so many possible sources apart from the original illegality that it was doubtful that the illegality was even a "but for" cause of the procurement of the challenged evidence. For example, in *Owen* we expressly relied upon the voluntariness of Owen's subsequent visits to the postal inspector's office, the quid pro quo given for Owen's cooperation, and the four-day time lapse between the arrest and the initial discussion between Owen and the inspector. 492 F.2d at 1107. In *Parker* we noted that "[t]he exact reason why Morales decided to tell the truth cannot be discerned from the record before us" and that "the facts will not permit us to tie the acquisition of the evidence clearly and directly to the confession . . . ." 498 F.2d at 630. In the present case, however, the arrests occurred on the same day that the illegally obtained evidence was procured and, as the above summary of the record clearly establishes, those wiretaps were a "but for" cause of the later arrests. Moreover, the nearly two-year fruitless in-



vestigation of the marijuana smuggling activities of the defendants indicates that their arrests on October 12 were secured through exploitation of the evidence obtained from the wiretaps, which had been instituted only about two weeks earlier.

Because the primary purpose of the exclusionary rule is deterrence, "[t]he critical question when dealing with attenuation should be whether the admissibility of the challenged evidence will create an incentive for illicit police activity in the future". Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif.L.Rev. 579, 646 (1968). In *Parker*, after noting that it was beyond the scope of the unlawful purpose of the police in obtaining Parker's confession to secure information from Morales, we observed that the exclusion of the confession would be "an ample deterrent". 498 F.2d at 630. In the present case, however, the police would not be adequately deterred by exclusion of the conversations intercepted by the wiretap. They would still have an incentive to make illegal wiretaps to obtain information that would *lead to* the arrest of the suspects. We therefore hold that, in order to effectuate the deterrent purpose of the Fourth Amendment exclusionary rule, it is necessary to reverse the convictions of Houltin and Phillips because they were based on evidence derived through exploitation of illegal wiretaps. *See* Pitler, 56 Calif.L.Rev. at 641-46; Comment, 115 U.Pa.L.Rev. at 1148-49.

II.

The appellants argue that their protections against double jeopardy were violated by the imposition of

consecutive sentences for the offenses of conspiring to possess (21 U.S.C. § 846) and conspiring to import marijuana (21 U.S.C. § 963). In addition, they contend that the indictment was duplicitous and led to a multiplicity of punishments for a single offense. They assert that there was only one conspiratorial agreement, and that, therefore, no matter how many illegal objects existed, there was only one conspiracy. Three circuits have decided this issue. Two have held that multiple prosecutions are not sustainable under the above two conspiracy provisions. *United States v. Honneus*, 1 Cir. 1974, 508 F.2d 566 (not sustainable), cert. denied, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101; *United States v. Adcock*, 6 Cir. 1973, 487 F.2d 637 (not sustainable); *United States v. Marotta*, 9 Cir. 1975, 518 F.2d 681 (sustainable). Today we even the score at two-two.

Assuming that there was only one conspiracy in the present case, Congress may choose to punish two aspects of that behavior without contradicting the Double Jeopardy Clause. In *Gore v. United States*, 1958, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405, the petitioner was prosecuted for the violation of three statutes by one sale of heroin. In rejecting his contention that this multiple prosecution violated his double jeopardy protections, the Supreme Court stated:

> It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress,



> somehow or other ought to have carried with them an implied indication by Congress that if all these three different restrictions were disregarded but, forsooth in the course of one transaction, the defendant should be treated as though he committed only one of these offenses. . . . Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

357 U.S. at 390-91, 78 S.Ct. at 1283-84. Similarly, in the present case, there are two different criminal statutes, each relating to different aspects of a conspiracy to import and distribute narcotics, and each prescribing separate punishments. For these reasons we respectfully disagree with the two Courts of Appeals that have held that separate convictions cannot be obtained under §§ 846 and 963 when there is only one conspiratorial agreement.

We strongly endorse, however, the reasoning of the Ninth Circuit in *United States v. Marotta*, 518 F.2d at 685, in which the Court upheld convictions under the two above statutes:

> The validity of appellant's convictions does not turn on whether there was one conspiracy or two. Congress has defined the evils to be prohibited as conspiracies with specified criminal objects. Granting that appellant was engaged in a single conspiracy with dual criminal objects, this court finds that Con-

> gress fully intended to permit punishing such conspiracies twice as severely as those which embraced only one of the specified criminal objects. . . . Congress has in effect determined that a conspiracy to import drugs with intent to distribute is twice as serious as a conspiracy to import for personal use or a conspiracy to possess with intent to distribute. Such a determination does not offend the double jeopardy clause . . . .

Our decision today is fully consistent with two cases on which the appellants rely, *Braverman v. United States*, 1942, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23; and *United States v. Mori*, 5 Cir. 1971, 444 F.2d 240, cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187. In *Braverman* the Court held that when there is a single agreement to violate several substantive statutes, the conspirators may not be prosecuted for more than one violation of the statute prohibiting conspiracies against the United States, presently 18 U.S.C. § 371. This holding reflected the Court's view that the congressional intent underlying that section was to adopt the common law definition of conspiracy, thereby proscribing the *agreement* to commit unlawful acts against the United States rather than the unlawful objects themselves.[6] In *Mori* we held that a single conspiracy to import heroin may not be held violative of both the general conspiracy statute, 18 U.S.C. § 371, and the statute that specifically proscribes conspiracies to import narcotics.[7] We held, as a matter of

6 The Court stated that "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, [18 U.S.C. § 371]". 317 U.S. at 54, 63 S.Ct. at 102.

7 The statute, 21 U.S.C. § 174, has since been repealed, but its relevant portion is similar to 21 U.S.C. § 963, which is at issue in the present case.



statutory construction, that "the catchall provisions of [the former] section become subsumed under the particular, specific provisions of [the latter] section". 444 F.2d at 245.

Unlike these cases, the present case involves *two specific* conspiracy statutes. We agree with the Ninth Circuit that Congress intended to punish conspiracies violating both statutes more severely than those violating only one of the statutes.

We have considered the defendants' other arguments and find each to be without merit. Before concluding, we note the seemingly anomalous result this opinion has achieved: the convictions of Houltin and Phillips, probably the leaders of the conspiracy, are reversed, while the other four conspirators — the underlings — remain in prison. This can be explained only by the compromise embodied in our law governing standing to invoke the exclusionary rule. *See* Comment, 115 U.Pa.L.Rev. at 1141. *But see Broeder, Wong Sun v. United States:* A Study in Faith and Hope, 42 Neb.L.Rev. 483, 539-45 (1963); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 154-58 (1948). That law balances the need to deter unlawful police conduct against the equally important need to imprison criminals. The result of this balancing is that the exclusionary rule may be asserted by only a portion of those against whom unlawfully seized evidence is sought to be used. The defendants with standing are those whose rights have been most egregiously violated: those whose legitimate expectations of privacy have been invaded by the State. *See United States v. Calandra*, 1974, 414 U.S. 338, 348, 94

S.Ct. 613, 38 L.Ed.2d 561. Hence, we reverse the convictions of Houltin and Phillips and affirm those of Burke, Morrison, Francis, and Croucher.

Affirmed in part, reversed in part.

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## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 76-4107

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN WILLARD HOULTIN and
KENNETH B. PHILLIPS,
Defendants-Appellants.

---

Appeal from the United States District Court for the
Western District of Texas

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ORDER:

The motion of appellant, HOULTIN for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 10, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT A. AINSWORTH, JR.
UNITED STATES CIRCUIT
JUDGE

Filed: April 25, 1978

Nos. 77-1643 and 77-6728

Supreme Court, U.S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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MARTIN WILLARD HOULTIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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KENNETH B. PHILLIPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 77-1643

MARTIN WILLARD HOULTIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 77-6728

KENNETH B. PHILLIPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the court of appeals reversing petitioners' initial convictions (Pet. App. 28a-46a)[1] is reported at 525 F.2d 943. The subsequent opinion of the court of appeals affirming petitioners' convictions after retrial (Pet. App. 1a-26a) is reported at 566 F.2d 1027.

## JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978, and a petition for rehearing was denied on April 10, 1978 (Pet. App. 27a). The petition for a writ of certiorari in No. 77-6728 was filed on May 10, 1978. The petition for a writ of certiorari in No. 77-1643 was filed on May 18, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether retrial of petitioners following reversal of their convictions for trial error is barred by the Double Jeopardy Clause.

2. Whether the immunized testimony of four previously convicted co-defendants should have been excluded as the fruit of unlawful electronic surveillance.

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[1] "Pet. App." refers to the appendix to the petition in No. 77-1643.



## STATEMENT

In an indictment filed in the United States District Court for the Western District of Texas, petitioners were charged with conspiracy to import approximately 2,260 pounds of marijuana, in violation of 21 U.S.C. 963, and conspiracy to possess the marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Also indicted on the same charges were co-defendants Robert Earl Burke, Kenneth J. Croucher, Michael R. Francis, and Duane Byron Morrison.

1. The indictment resulted from a lengthy and intensive investigation of narcotics smuggling activities by petitioners and their co-defendants (Pet. App. 29a). In the course of that investigation, New Mexico law enforcement officials received state court authorization to intercept the telephone communications of petitioner Houltin and co-defendants Burke and Morrison (*ibid.*). Pursuant to that order, state law enforcement officers intercepted two telephone communications, one between petitioner Houltin and his wife, and one between Houltin's wife and petitioner Phillips' wife, who was speaking from Phillips' home.

Prior to trial, all of the defendants moved to suppress the evidence obtained as a result of those interceptions. The district court held that the wiretap authorization was improper but declined to suppress the marijuana seized at the time of the defendants' arrests, concluding that the arrests were not the

product of the unlawful interceptions (*id.* at 29a-30a).[2]

The evidence showed that petitioners participated in the clandestine importation of more than a ton of marijuana from Mexico into this country on October 12 and 13, 1973. Agents of the Drug Enforcement Administration and the United States Customs Service tracked three private aircraft from Columbus, New Mexico, across the border into Mexico on the afternoon of October 12. Airborne surveillance teams observed the three airplanes land in a dry lakebed in Mexico, meet a large van, and then return to New Mexico approximately twenty minutes later (III R. 87-92). When the airplanes arrived near Magdalena, New Mexico, at 9:30 p.m., one of the pilots radioed "ground support" to "turn on your flashers." The agents then saw a set of automobile emergency flashers blink on and off for a few seconds (*id.* at 93-96). Shortly thereafter, the automobile drove to another location and turned on its lights. The three airplanes then landed beside the automobile and took off again a few minutes later (*id.* at 98-99, 105).

New Mexico State Police subsequently arrested co-defendant Croucher at the spot where the aircraft had landed and found 2,260 pounds of marijuana in bags

[2] The district court concluded that the interceptions were unlawful because state authorities had failed to comply with 18 U.S.C. 2516(2), which requires that applications for wiretap authorization be made by the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof." The application for authorization in this case was made by an assistant district attorney (Pet. App. 2a n.1, 30a n.1).



stacked nearby (III R. 253-255). Petitioner Phillips, who had apparently been manning the "ground support" automobile, was arrested at a roadblock near the site where the marijuana had been found (*id.* at 310-311, 299-301). Petitioner Houltin was arrested along with co-defendants Burke, Francis and Morrison at the Columbus airport as they alighted from their airplanes. The arresting agents searched the planes and found marijuana debris in each of them (*id.* at 319-323).

After a jury trial, petitioners and their co-defendants were convicted and sentenced on both counts of the indictment.

2. On appeal, the court of appeals reversed petitioners' convictions, holding that petitioners had been arrested and the marijuana seized on the basis of information derived from the unlawful wire interceptions (Pet. App. 33a-41a).[3] The district court then set the case for retrial.

Prior to the second trial, the district court granted the government's application for immunity to the four co-defendants whose convictions had been upheld (IV R. 45-56). Petitioners then moved to dismiss the indictment, claiming that the Double Jeopardy Clause barred reprosecution following the reversal of their convictions (Pet. App. 37a; IV R. 41-44, 57-61).

[3] The court affirmed the convictions of co-defendants Burke, Croucher, Francis and Morrison, ruling that they lacked standing to challenge the legality of the interceptions since only telephone communications between petitioner Houltin and his wife and between Mr. Houltin and Mrs. Phillips had been intercepted (Pet. App. 31a-36a).

Petitioner Phillips also moved to suppress the testimony of the four co-defendants on the ground that their testimony and availability to the government was the fruit of the unlawful wire interceptions (V R. 24-25). The district court denied both motions. The court first concluded that the court of appeals had not intended to bar further prosecution of petitioners when it had remanded the case, and that retrial was therefore permissible. The court held in addition that because the investigating agents knew the identity of the four co-defendants from independent sources prior to the illegal wiretap, suppression of the co-defendants' testimony was not required (IV R. 70-71). Petitioners immediately appealed, but the court of appeals dismissed their appeals as interlocutory (VI R. 8).[4]

3. The case was then submitted to the district court on stipulated facts, including an agreement that the testimony of the four co-defendants would be the same as that of the government agents who had testified at the first trial (VII R. 27).[5] Petitioners were

[4] Under *Abney* v. *United States*, 431 U.S. 651, the district court's order denying petitioners' motion to dismiss on double jeopardy grounds would now be appealable in advance of trial.

[5] The parties also stipulated that on October 12, 1973, prior to the airplane flight to Mexico to obtain the marijuana, petitioner Houltin and co-defendant Croucher had met at an airport near El Paso, Texas, and had flown the airplanes used in the transaction to Columbus, New Mexico (VII R. 27). In addition, the government informed the court that between October 2, 1973, and October 12, 1973, government agents had



convicted as charged and were sentenced to consecutive terms of five years' imprisonment on each count and a special parole term of three years on count one and two years on count two. In addition, petitioner Houltin was fined $5,000 on each count, and petitioner Phillips was fined $2,500 on each count (VI R. 42-43).[6] A divided court of appeals affirmed (Pet. App. 1a-26a).

## ARGUMENT

1. Petitioners contend (Houltin Pet. 5-7; Phillips Pet. 12-14) that without the evidence held inadmissible on their first appeal, there was insufficient evidence at their first trial to establish their guilt beyond a reasonable doubt. Therefore, they argue, their retrial was barred by the Double Jeopardy Clause. As the court of appeals noted, however, the reversal of petitioners' convictions was predicated not on the insufficiency of the evidence against them, but solely "upon a procedural defect in the trial court—the admission of evidence resulting from the illegal wiretaps" (Pet. App. 14a). Because the court of appeals did not reverse for evidentiary insufficiency, the retrial did not offend the Double Jeopardy Clause. *Burks* v. *United States*, No. 76-6528, decided June 14, 1978,

conducted visual surveillance of petitioners and co-defendants Burke and Morrison in the El Paso area (*ibid.*).

[6] On the government's motion, the district court subsequently dismissed count two of the indictment and vacated petitioners' sentences on that count.

slip op. 13. As this Court stated in *Burks* (slip op. 14):

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished [citation omitted].

Even if it is true, as petitioners assert (Houltin Pet. 6-7; Phillips Pet. 13-14), that without the evidence ruled inadmissible by the court of appeals, the evidence at their first trial would have been insufficient to sustain a conviction, that does not alter the essential character of the court of appeals' determination, which was limited to a finding of trial error—a defect wholly unrelated to the factual question of guilt or innocence. Cf. *United States* v. *Scott*, No. 76-1382, decided June 14, 1978, slip op. 15. There was clearly sufficient evidence to support petitioners' convictions at the first trial (see Pet. App. 15a n.6), even though some of it was later held inadmissible. Retrial after the reversal therefore did not offend the Double Jeopardy Clause.



2. Petitioners also contend (Houltin Pet. 7-8; Phillips Pet. 6-12, 14) that the stipulated testimony of their co-defendants should have been suppressed as the fruit of the unlawful wire interceptions. As both courts below determined, however, the co-defendants' testimony "came from a source independent of the illegal wiretaps. It is undisputed that the DEA agents knew the identity of the four co-defendants for several years before the illegal wiretaps" (Pet. App. 7a; see also IV R. 71). Because the government's discovery of these witnesses was independent of any statutory violation, their testimony was admissible against petitioners at trial. *Wong Sun* v. *United States*, 371 U.S. 471, 487; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392. The factual determination that the testimony was derived from a source independent of the unlawful wiretaps was concurred in by both courts below; review by this Court is therefore unwarranted. See *United States* v. *Ceccolini*, No. 76-1151, decided March 21, 1978, slip op. 4; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

In any event, even if there were some causal connection between the illegal conduct and the challenged evidence, that connection would not require suppression on the facts of this case. Petitioners seek to exclude live-witness testimony because of a technical statutory violation by state law enforcement officers. Because the cost to society of excluding live-witness testimony is often greater than the cost of excluding tangible evidence, "the exclusionary rule

should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object" (*United States* v. *Ceccolini, supra,* slip op. 11-12). *A fortiori,* there is no reason for suppression when the violation is a technical statutory error.

As in *Ceccolini,* there is not the slightest evidence to suggest that the violation was intentional or that the state authorities committed the violation for the purposes of producing potential witnesses against petitioners. Similarly, as in *Ceccolini,* the witnesses were already known to law enforcement authorities prior to the violation. In light of the technical nature of the statutory defect in this case, "[t]he cost of permanently silencing [the witnesses] is too great for an even-handed system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect" (*United States* v. *Ceccolini, supra,* slip op. 11) and would thus be wholly disproportionate to the official misconduct. See *United States* v. *Calandra,* 414 U.S. 338, 348, 351; *Stone* v. *Powell,* 428 U.S. 465, 486.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1643

MARTIN WILLARD HOULTIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

## PETITIONER'S BRIEF IN REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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# PETITIONER'S BRIEF IN REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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The Petitioner, MARTIN WILLARD HOULTIN, having filed his Petition For a Writ of Certiorari and having received the *Brief of the United States in Opposition*, respectfully submits his reply to the *Brief of the United States in Opposition*.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was reported as *United States v. Houltin*, 566 F.2d 1027 (5th Cir. 1977), (reproduced, Pet. App. 1a-26a). The prior opinion of the United States Court of Appeals for the Fifth Circuit involving this Petitioner's cause was reported as *United States v. Houltin*, 525 F.2d 942 (5th Cir. 1976), (reproduced, Pet. App. 28a-46a).

## JURISDICTION

This Court's jurisdiction is invoked under the authority of Title 28, United States Code, §2154, (Pet. 2). The Government contends in its *Brief in Opposition*, (Resp. 2), that this Petitioner's *Petition for Certiorari* was untimely by eight days. Should this Court find this to be the case, the Petitioner would note that such a defect is not jurisdictional, *Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 451, 3 L. Ed 2d 407, 410 (1959), and would respectfully request that this Court exercise its discretion to consider his cause.

## QUESTIONS PRESENTED

1. Whether the Government should be allowed to retry a defendant whose conviction was reversed because of insufficient evidence, i.e., because all of the evidence against him was the result of an illegal wiretap. (restated from Pet. 2)

2. Whether the Government should be allowed to use the testimonial evidence of the co-defendants of



Petitioner herein who were convicted as a result of an illegal wiretap to which they lacked standing to object and who testified under a grant of use immunity at Petitioner's retrial. (restated from Pet. 3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (restated from Pet. 3).

2. The Fifth Amendment provides in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. (restated from Pet. 3).

## REPLY TO THE ARGUMENT OF THE UNITED STATES

### I

### Certiorari Should Be Granted To Clarify The Double Jeopardy Implications of Appellate Court Reversals For Insufficient Evidence.

This Petitioner places his primary reliance on the second question presented herein, that of whether the testimony used to convict this Petitioner was a forbidden fruit of an illegal wiretap and thus should have been excluded by the Court below. Nonetheless, in regard to the double jeopardy question, this Petitioner feels obligated to respond to the Government's extensive use of *Burks v. United States*, ___ U.S. ___, 98 S.Ct. ___, 57 L. Ed 2d 1 (June 14, 1978), a decision not available at the filing of this Petitioner's original *Petition for Certiorari*, (see Resp. 7-8). This Petitioner would admit that the general language of *Burks* would relegate some reversals dealing with the admission of evidence to the category of mere "trial error" reversal, thus not invoking the protections of the double jeopardy clause, *Burks*, 57 L. Ed 2d, at 12. However, *Burks* does not speak directly to the question in the instant cause. This question would be whether the Government may legitimately retry an individual after first consciously proceeding against him with suspect evidence. The word "consciously" is used because in this case the Government was on notice that its evidence was suspect from the very moment the trial Judge held the Government's wiretap to be illegal. The Government's knowledge as to the facts surrounding the wiretap and the federal agents' subsequent actions was, of course, vastly superior to that of the Defendants or that of the Court.

The Petitioner contends that such a prosecution invokes the protection of the double jeopardy clause. A contrary rule would be highly detrimental to the constitutional rights protected by the exclusionary rule. "Tainted" evidence would have a use in the prosecutor's arsenal. As in this case, the admission of



tainted evidence could be used to gain time and could be used to gain convictions of co-defendants lacking standing without risking anything but a retrial. Thus, the very use of tainted evidence could convert a bad case into a good one after a trial and an appeal. Any effective use of tainted evidence as noted above would not escape the notice of federal law enforcement officers, and thus would diminish the effectiveness of the exclusionary rule and the values it protects.

Secondly, if reversals grounded on the Government's use of tainted evidence could never invoke the protections of the double jeopardy clause, then there would be no legal bar to a string of consecutive prosecutions based on various restructurings of the tainted evidence as in the instant case. Would this not offend the principle set forth in *Burks* as being the very essense of the double jeopardy clause?

> To protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. (citations omitted) *Burks*, 57 L.Ed at 10.

Looking at the instant case, we can ask the question that if this Court were to grant certiorari and were to hold that the compelled testimony used to convict this Petitioner should have been excluded, could this Petitioner be tried again on another reformulation of the tainted evidence?

The Petitioner recognizes that the double jeopardy clause is the more difficult of two possible approaches

to the problems of *Houltin*. The exclusionary rule is much easier to apply given the facts of this case. However, it may very well be that the double jeopardy clause is the only real remedy in a case such as this.

## II

### Certiorari Should Be Granted To Prevent The Government From Diluting The Policy Behind The Exclusionary Rule of Deterring Official Misconduct And Unlawfulness.

In its *Brief for the United States in Opposition*, the Government placed its primary emphasis on *United States v. Ceccolini*, ___ *U.S.* ___, 98 S.Ct. ___, 55 L.Ed 2d 268 (1978), (Resp. 9, 10). However, the Government pointedly failed to make any close comparison between the determining factors set out in *Ceccolini* and the facts of the instant cause. Justice Rehnquist listed some six factors involved in the *Ceccolini* case which formed the basis of the Court's finding that the testimony was admissible: (1) the testimony was a product of the free will of the witness, in "no way coerced or induced by official authority"; (2) the tainted fruit was not used in questioning the witness; (3) substantial periods of time elapsed between the initial illegality and the initial contact with the witness; (4) both the identity of the witness and the relationship between the witness and the defendant was well known to those investigating the case; (5) the law enforcement officials did not commit the illegality in hopes of obtaining evidence or a witness as to the crime charged; and (6) that application of the exclusionary rule would not have the "slightest



deterrent effect" on the law enforcement officials involved, *Ceccolini*, 55 L.Ed 2d at 279. Looking at these factors closely, we see that they bear no resemblance to the case at hand.

1. *No inducement or coercion by official authority.* The witness in *Ceccolini* was found to have made her decision out of her own "free will," *Ceccolini*, 55 L.Ed. 2d at 279. In our case, the United States Attorney at the second trial admitted that the witnesses were unwilling witnesses, (IV R 28); likewise, the trial court also acknowledged this lack of willingness to testify, (IV R 28). Thus there was a lack of "free will" on the part of witnesses. On the part of official authority there was coercion. "Inducement" would be a euphenism in this case.

First, the illegal wiretap resulted in the arrest of the witnesses and the seizure of evidence to be used against them:

> The above summary of the evidence indicates that the defendants have carried their burden of proving that their apprehension and the marijuana seizure resulted from the exploitation of information gleaned from the illegal wiretaps. *Houltin I*, 525 F.2d at 948.

Second, the wiretap and its fruits were the basis of the prosecution and conviction of these defendants in the State of New Mexico, *Ibid*, at 945. Third, the fruits of the wiretap were used to prosecute and convict the defendants in a United States District Court in Texas, *Ibid*, at 945. Fourth, as a result of those convictions the

defendants were sentenced to the maximum imprisonment provided by law along with various fines and special parole terms, *Ibid*, at 945. Fifth, the convictions and sentences of defendants who were later to become witnesses were affirmed by the Fifth Circuit solely because of their lack of standing to object to illegal fruits of the wiretap, *Ibid*, at 946. Sixth, the Government granted the convicted defendants "use immunity[1]", thereby threatening them with contempt citations should they refuse to testify. *Houltin II*, 566 F.2d at 1032, 1037. Seventh, the final form of these witnesses' testimony was a word for word repetition of the testimony of the agents at the first *Houltin* trial, that earlier testimony having been barred as a fruit of the wiretap. *Ibid*, at 1036. Thus, the coercion of these witnesses began with the first use of the illegal wiretap to secure their arrest and continued to the point where they were compelled to repeat the words of the officer's testimony as to what they learned and did as a result of the illegal wiretap. To state that these former witnesses testified or that the testimony was "in no way coerced or even induced by official authority as a result of the [illegality]," is to destroy both the common and legal meaning of the descriptive words used in *Ceccolini*, 55 L. Ed 2d at 288.

2. *The use of fruits.* In *Ceccolini*, 55 L.Ed 2d at 279, a point was made that the fruits of the illegality were not

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1 After having been prosecuted and convicted by both sovereigns, the State of New Mexico and the United States, these defendants were granted "use immunity" by the United States and required under threat of contempt to testify as to offenses which were the basis of the above convictions. Such "use immunity" after having been fully prosecuted by both State and Federal Government is the emptiest immunity this Counsel has ever encountered and runs directly contrary to the principle of fundamental fairness inherent in our Criminal Justice System.



used to question the witness. Here, as pointed out above and in Judge Wisdom's dissent in *Houltin II*, the fruit of the illegal wiretaps, i.e., the testimony of the federal agents, "influenced", if not determined, what the evidence of the witnesses would be, *Ibid*, at 1036.

3. *Elapsed time.* Contrary to the facts in *Ceccolini*, the initial contact with the witnesses was made at their arrest, which was the very first "fruit" of illegal wiretap information gained only hours before. Thus, the initial contact was at least contemporaneous if not immediate.

4. *Knowledge of identities and relationship.* Here, the Government is on somewhat firmer ground. The Government did have some intelligence as to identities of the defendants, IV R 77, but as Judge Wisdom pointed out in his dissent in *Houltin II:*

> The Government did not have a fruitful source for the evidence before the taps. Although the federal agents knew the identities of all the conspirators, they have been unable to develop a case. Indeed, this inability to prove their case caused the investigators to place the illegal wiretap. (citation omitted) * * * Only because of the wiretap evidence did the prosecutor have available four witnesses who could be "immunized" without cost. *Houltin II*, at 1036.

5. *The illegality was not committed with instant prosecution in mind.* In *Ceccolini*, at 279, it was found that there was "not the slightest evidence to suggest"

that the illegality was committed "with the intent" to gain evidence on the prosecution in question. In our case, the Government agents had sought the illegal wiretap initially because of their failure to gain enough evidence against the defendants to charge them with narcotic violations, *Houltin I*, at 947; *Houltin II*, at 1036; and as their wiretap application revealed, this was the sole reason for placing the illegal wiretap, to gain evidence or witnesses so that the individuals could be charged with the same violations that they were ultimately charged with, *Houltin I*, at 947-948.

6. *Effect on deterrence.* In its *Brief in Opposition*, the Government has sought to characterize the law officers involved as "state authorities," (Resp. 10). This does not comport with the facts of the case. The record of the first trial is, of course, in accord. The record reveals that "case agent" supervising and coordinating the investigation was a Drug Enforcement Administration Agent for the Federal Government, (II R 431, 477-478); and that this "case agent" was assisted by other federal agents from the D.E.A. (II R 72, 250), and from United States Customs (II R 166, 192, 466). In *Houltin I*, the Fifth Circuit found that it was "a joint federal state investigation sponsored by the Drug Enforcement Administration (D.E.A.)," and that it was "the Government" [who] "admitted that its investigative procedures had failed and applied to the State Court in New Mexico for authorization to tap the telephones of Houltin, Morrison, and Burke." *Houltin I*, at 947. Although the attempt to analogize the above operation with the questionable activities of State Police Officer "Biro" in *Ceccolini* is apparent, the analogy does not lie.



Next, the Government contends, as in *Ceccolini*, that exclusion of the evidence would only have " 'a speculative and very likely negligible deterrent effect.' (citing *Ceccolini*)," (Resp. 10). Having viewed the character of operation above and noting the various federal agencies involved, the Government's contention that any exclusion of evidence by this Court would only have a "negligible effect," (Resp. 10), on these Drug Enforcement officers and Customs officers is an insult to their intelligence; and the inferrence that these officers would continue illegal wiretaps in spite of any pronouncement from this Court is a slur on their integrity. The officers of the Government must be given more credit than that, if only so that this pessimistic view of them will not become a reality.

In summary, our case is not *Ceccolini* by any measure. *Ceccolini*, and the cases cited by the majority in *Houltin II*, i.e.: *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963); and *United States v. Holsey*, 437 F.2d 250 (10th Cir. 1970), involve mere witnesses who are more or less inadvertently discovered as an unintended by-product of the primary illegality. That is not our case.

## FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The facts of this case present clear and compelling reasons for the granting of a writ of certiorari. In his final argument and conclusion, this Petitioner would advance three additional reasons for granting certiorari in this case. First, the writ should be granted

because it involves a combination of the two areas of law recently explored by this Court in *Burks* and *Ceccolini*, and thus the timing is ripe for the consideration of this cause. Secondly, the writ should be granted because the question presented herein, which involves tainted and compelled testimony of convicted codefendants, is a case of first impression. As Judge Wisdom noted in his vigorous dissent in *Houltin II:*

> That no court has ever excluded evidence in a comparable fact situation does not mean a decision to exclude would extend the exclusionary rule. It probably means that no prosecutor has ever dared to attempt to use the procedure sanctioned by the Court today. *Ibid.*, at p. 1038.

Lastly, the writ should be granted because, as Judge Wisdom warned in *Houltin II*, at p. 1038, we will see *Houltin* reenacted again. Should this honorable Court see fit to deny a writ of certiorari in this case, *Houltin II* will become the law for the large area of the nation encompassed by the Fifth Circuit. There, the *Houltin* drama will be replayed. Any evidence, no matter how tainted, will be utilized in conspiracy prosecutions if at least one co-conspirator lacks standing to challenge it. All of the defendants will be convicted and sentenced. Those defendants who have standing will prevail in the appellate courts, only to face retrial under the Government's reading of *Burks*. At this retrial, those defendants with standing will be subjected to compelled testimony against them by those defendants whose convictions were affirmed because of lack of standing and who were granted the "empty" *Houltin* immunity, as in our case. Thus, the exclusionary rule will cease to operate in any case in-



volving multiple defendants where one defendant has a standing problem. Aside from the fatal blow to the exclusionary rule, the *Houltin* "procedure" would also deal a blow to the Appellate Courts. Having to go through a ritual of first reversing, then affirming in such cases would tend to diminish the dignity of these courts in the eyes of all onlookers, including defendants, defense counsel, prosecutors, and law enforcement officers alike. This is the future that *Houltin II* portends.

In *Houltin I*, at 951-952, Judge Wisdom pointed to the probable culpability of this Petitioner, and he also notes in both *Houltin I* and *II* that the issues involved herein could be deemed merely procedural in nature. In this regard, the petitioner would argue to this Court that guilt or innocence in this nation is not determined by lot or by divination, but instead by the correct and steady application of those procedures and principles embodied in our great tradition of criminal justice. It is with this in mind, that the petitioner respectfully requests that this Court accept the burden of applying those procedures and principles in his cause through granting a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the ____ day of August, 1978, he served three copies of the foregoing Reply Brief upon the opposing counsel by placing them in the United States Mail with proper postage affixed, addressed to:

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